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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.B., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JUNIUS B.,

Defendant and Appellant.

D041149

(Super. Ct. No. J513909)

APPEAL from an order of the Superior Court of San Diego County, Hideo Chino,  
Referee. Reversed with directions.

Junius B. appeals an order summarily denying his Welfare and Institutions Code  
section 388 petition for modification and selecting and implementing a permanent plan of  
guardianship for his minor son J.B. (Statutory references are to the Welfare and  
Institutions Code.) Junius contends the court erred in summarily denying his section 388

petition in which he sought to challenge the adequacy of notice he received. He further contends the court's visitation order improperly delegated to J.B.'s guardian the right to control visitation. We conclude the court abused its discretion in summarily denying Junius's section 388 petition. Based on the record before us, it appears Junius was denied due process for lack of proper notice. Accordingly, we reverse the order.

### FACTUAL AND PROCEDURAL BACKGROUND

In May 2001, the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court on behalf of four-year-old J.B. under section 300, subdivision (b) alleging his mother Sharon K. had a drug problem and J.B. was found wandering in the street and begging for food while Sharon slept in her car. The petition further alleged the whereabouts of J.B.'s father were unknown and Sharon was incarcerated. Junius was named as the father on J.B.'s birth certificate and there were no other alleged fathers. Sharon admitted Junius was the father. The social worker knew Junius lived in New York City and that Sharon had his telephone number.

At the time of the jurisdiction/disposition hearing, the results of a parent search for Junius were still pending. After finding proper notice had been given, the court declared J.B. a dependent, placed him in foster care and ordered Sharon to participate in services.

By the 12-month review hearing in June 2002, Sharon had not complied with her case plan and Agency recommended guardianship as J.B.'s permanent plan. J.B. was doing well in the home of Janet D. where his older half brother also lived. The social worker reported she had no new information about Junius, who still had no notice of the pending proceedings. Sharon told the court she knew how to contact Junius in

New York. The court found Sharon had not made substantive progress with the requirements of her case plan, terminated services and set a section 366.26 selection and implementation hearing.

On June 19, 2002, Agency contacted Junius by mail at his address in New York. Junius responded immediately and requested appointed counsel. He filed a paternity inquiry indicating he believed he was J.B.'s father. He signed a declaration of paternity when J.B. was born, had his name listed as J.B.'s father on the birth certificate, lived with J.B. from 1996 to 1997, had J.B. in his home several times, told relatives J.B. was his son, and helped support him.

Junius first appeared with counsel at the selection and implementation hearing on October 1, 2002, asserting his paternity and raising issues of improper notice. The court continued the matter for "further investigation." At the continued hearing on October 9, counsel for Junius requested the court find Junius was a presumed father. County counsel objected, arguing there was no pending section 388 petition, and the only relevant issue was whether guardianship was the appropriate permanent plan for J.B. The court found Junius was an alleged father and denied his request for a continuance for purposes of establishing his presumed father status. After finding notice was properly given, the court ordered a permanent plan of guardianship for J.B., appointed Janet as J.B.'s guardian and ordered reasonable visitation for the parents, with the time, place, manner, frequency and length of visits to be determined by Janet in J.B.'s best interests. The court then followed Agency's recommendation to keep the case open for two weeks as to the issue of paternity.

Junius filed a section 388 modification petition seeking to have the court set aside its jurisdictional findings and orders on the ground Agency failed to make reasonable search efforts to notify him of the proceedings. In support of his petition, Junius submitted a declaration by his attorney's investigator showing the ease with which he located Junius. Junius asserted granting the petition was in J.B.'s best interests because he was entitled to be with his biological father. The court stated it was inclined to deny the petition, but instead continued the matter. However, the minute order from that hearing states the section 388 petition was denied.

Junius twice moved for a rehearing on the ground the court abused its discretion in summarily denying his section 388 petition. The court denied both motions. The court also denied Junius's request for a trial on the issue of paternity and terminated its jurisdiction.

## DISCUSSION

### I

Junius contends the court erred in denying his section 388 modification petition without a hearing. He asserts the court improperly refused to recognize the new evidence regarding Agency's failure to attempt to locate and notify him of the proceedings until the selection and implementation hearing was set. He further asserts he was entitled to a hearing because the evidence showed J.B.'s best interests would be promoted by the proposed change in the court's order. J.B.'s counsel on appeal joins in these arguments.

## A

Under section 388, a party may petition the court to change, modify or set aside a previously made court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) The petition must be liberally construed in favor of granting a hearing to consider the parent's request. (Cal. Rules of Court, rule 1432(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) The parent is "not required to establish a probability of prevailing on the petition" (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414), but instead "need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.) If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. (*In re Jasmon O., supra*, 8 Cal.4th at p. 415; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799.) Failure to provide a full and fair hearing on the merits of a section 388 petition violates the petitioning party's procedural due process rights. (*In re Jeremy W., supra*, 3 Cal.App.4th at p. 1414.)

## B

We note preliminarily, and the parties concede, the court never ruled on Junius's section 388 petition. According to the reporter's transcript, the court stated it was inclined to deny the petition but instead continued the matter. Although no ruling was ever forthcoming, the minute order from that hearing states the section 388 petition was

denied. A conflict between the reporter's and clerk's transcripts is ordinarily resolved in favor of the reporter's transcript. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Maribel T.* (2002) 96 Cal.App.4th 82, 86.) Thus, Junius is at least entitled to a ruling on his section 388 modification petition. However, because the parties and the court proceeded as if the petition had been denied, we treat the ruling accordingly and review it for abuse of discretion. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.)

## C

A parent who was denied notice and an opportunity to be heard at the early stages of a dependency proceeding can challenge findings of proper notice by filing a section 388 petition. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481 [section 388 provides a parent the right to challenge lack of due process notice]; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1408 [counsel was ineffective when she did not file section 388 petition on behalf of father to challenge inadequate notice].) In his section 388 petition, Junius sought modification of orders in which the court found proper notice had been given to him at previous hearings. In support of his petition, Junius alleged Agency did not act with reasonable diligence to locate him when he did not receive notice of the proceedings until June 2002, more than one year after the court made its jurisdictional and dispositional findings and orders. Thus, Junius asserted new evidence as required by section 388 because the court was unaware of these facts before he raised them. Junius also alleged a hearing on the section 388 petition was in J.B.'s best interests because he was entitled to a relationship with his biological father. (See, e.g., *In re Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 844 [biological connection between father and child is

unique]; *In re O.S.*, *supra*, 102 Cal.App.4th at p. 1410.) Further, "it is implicit in the juvenile dependency statutes that it is always in the best interests of a minor to have a dependency adjudication based upon all material facts and circumstances and the participation of all interested parties entitled to notice." (*Ansley v. Superior Court*, *supra*, 185 Cal.App.3d at pp. 490-491.) At a minimum, Junius made a prima facie showing to trigger the right to proceed by way of a full hearing. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

Agency, both at trial and on appeal, mistakenly asserts Junius's section 388 petition was defective because he was not seeking immediate custody of J.B. However, section 388 does not condition the granting of a hearing on a request for immediate custody. (See *Ansley v. Superior Court*, *supra*, 185 Cal.App.3d at p. 481.) Junius was not required to show he was seeking immediate placement of J.B. Rather, by filing a section 388 petition, Junius properly asked the court to set aside the jurisdictional findings and provide him his due process right to notice and an opportunity to be heard. The court erred in summarily denying Junius's section 388 petition. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 675; *In re Hashem H.*, *supra*, 45 Cal.App.4th at p. 1799.)

## D

Based on the record before us, it appears Junius's claim that Agency did not exercise reasonable diligence to locate and notify him of the pending proceedings is meritorious. Agency has a duty to exercise reasonable diligence in searching for any missing parent. (*In re O.S.*, *supra*, 102 Cal.App.4th at p. 1409; *In re Julia U.* (1998) 64

Cal.App.4th 532, 542; *David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016.) Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598-599; *In re Megan P.* (2002) 102 Cal.App.4th 480, 489.) Here, although Agency reported a parent locator had been initiated before the jurisdiction/disposition hearing, no search efforts were documented. Agency knew Junius's full legal name, date of birth and last known residence (New York) as early as May 2001, yet nothing in the record suggests any effort of any kind was made to continue searching for Junius between disposition and the setting of the selection and implementation hearing. A parent search form was not submitted until June 2002, after reunification services were terminated and a selection and implementation hearing set, when, for the first time, notice was sent to Junius at his New York address. Moreover, although Agency knew Sharon had Junius's telephone number, there is no indication Agency asked her for, but was refused, this information. Had Agency used reasonable diligence and conducted a thorough, systematic investigation in good faith, Junius could have been located. (*In re Arlyne A., supra*, 85 Cal.App.4th at pp. 598-600.) From this evidence, a reasonable inference could be drawn that Agency was derelict in the performance of its duties and Junius was denied his due process right to notice and an opportunity to be heard. (*In re Megan P., supra*, 102 Cal.App.4th at pp. 489-490.) "[I]f a parent proves the absence of due process notice to him in juvenile dependency proceedings[,] a 'fatal defect' exists in the jurisdiction of the juvenile court to have entered the dependency judgment." (*Ansley v. Superior Court, supra*, 185 Cal.App.3d at p. 483.)



Agency argues J.B.'s interest in stability and permanency would not be promoted by returning the case to "square one." This argument is misguided. J.B. is presently in a potentially temporary placement. (*Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251 [guardianship is not irrevocable and thus falls short of secure and permanent placement].) A hearing on the section 388 petition and the likely successful outcome (i.e., returning the case to the jurisdictional phase) will give Junius the opportunity to establish presumed father status, reestablish and develop his relationship with J.B., and prove his fitness as a parent, thereby increasing J.B.'s potential for permanence and stability, the court's foremost concern in determining a child's best interests. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251.) To deny Junius this opportunity overlooks his "fundamental due process right to notice and an opportunity to be heard on the custody and care of his child" and "contravenes the statutory dependency scheme." (*In re Julia U., supra*, 64 Cal.App.4th at p. 544.)

## II

Junius contends the court erred in delegating all authority over visitation to J.B.'s guardian. In light of our reversal, we need not address this point. In any event, a challenge to the court's visitation order is cognizable on appeal only if the issue is first raised in the trial court. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338; *In re Riva M.* (1991) 235 Cal.App.3d 403, 412.)

## DISPOSITION

The order summarily denying Junius's section 388 petition and issuing letters of guardianship is reversed. The matter is remanded to the juvenile court with directions to conduct an evidentiary hearing on the petition.

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McINTYRE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McCONNELL, J.